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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 686 (LAK)

5 JAMES GATTO, a/k/a "Jim,"
6 MERL CODE,
7 CHRISTIAN DAWKINS,

8 Defendants.

-----x

9 March 5, 2019
10 11:30 a.m.

11 Before:

HON. LEWIS A. KAPLAN,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY BERMAN

16 United States Attorney for the
17 Southern District of New York

18 BY: EDWARD B. DISKANT

19 NOAH D. SOLOWIEJCZYK

20 ALINE R. FLODR

21 ELI J. MARK

22 Assistant United States Attorneys

23 WILLKIE FARR & GALLAGHER LLP

24 Attorneys for Defendant Gatto

25 BY: MICHAEL S. SCHACHTER

CASEY E. DONNELLY

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APPEARANCES (Cont'd)

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Attorneys for Defendant Code

BY: MARK C. MOORE

-and-

MERL F. CODE

HANEY LAW GROUP PLLC

Attorneys for Defendant Dawkins

BY: STEVEN A. HANEY

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1 (In open court)

2 (Case called)

3 MR. DISKANT: Good morning, your Honor. Edward
4 Diskant, Noah Solowiejczyk, Eli Mark and Aline Flodr for the
5 government.

6 MR. SCHACHTER: Good morning, your Honor. Michael
7 Schachter and Casey Donnelly on behalf of Mr. Gatto, who is
8 present in court.

9 THE COURT: Good afternoon.

10 MR. MOORE: Good morning, your Honor. Mark Moore and
11 Merl Code for defendant Merl Code, and we are ready.

12 MR. HANEY: Good morning, your Honor. Steve Haney
13 appearing on behalf of Mr. Dawkins.

14 THE COURT: Mr. Haney.

15 Have all of the defendants and all of their counsel
16 had the presentence reports for the necessary period?
17 Mr. Schachter?

18 MR. SCHACHTER: Yes, your Honor.

19 THE COURT: And Mr. Moore?

20 MR. MOORE: Yes, your Honor, we have.

21 THE COURT: And Mr. Haney?

22 MR. HANEY: Yes, your Honor. Thank you.

23 THE COURT: OK. Mr. Gatto, have you read the
24 presentence report and discussed it with fully with your
25 attorneys?

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1 DEFENDANT GATTO: Yes, your Honor.

2 THE COURT: Same question to you, Mr. Code.

3 DEFENDANT CODE: Yes, your Honor.

4 THE COURT: And Mr. Dawkins.

5 DEFENDANT DAWKINS: Yes, your Honor.

6 THE COURT: The presentence reports will be sealed and
7 available to counsel in the event of an appeal.

8 Now, I take it we have two unresolved objections to
9 the presentence report. One has to do with the loss amount,
10 and the other has to do with sophisticated means.

11 Is there anything else?

12 MR. DISKANT: Not from the government.

13 MR. SCHACHTER: No, your Honor, other than there is a
14 restitution issue as well.

15 THE COURT: Yes. As for that, I'm not going to deal
16 with that today; we're going to put that off --

17 MR. MOORE: No, your Honor.

18 THE COURT: -- because you all filed so many papers so
19 late.

20 OK. Let's deal first with the sophisticated means
21 point. Obviously, I've read what you've submitted on it. I've
22 read what you have submitted on it, but if anybody wants to add
23 anything briefly, I will certainly hear it. Mr. Schachter, why
24 don't we start with you.

25 MR. SCHACHTER: No, your Honor. We are aware that the

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1 Court reads everything before the Court. We have nothing to
2 add beyond what is in our papers.

3 THE COURT: Mr. Moore?

4 MR. MOORE: I agree completely with Mr. Schachter. I
5 think our positions are well set out in the papers, your Honor.

6 THE COURT: Mr. Haney?

7 MR. HANEY: I would concur, your Honor.

8 THE COURT: Mr. Diskant?

9 MR. DISKANT: I also agree, your Honor.

10 THE COURT: There will be a two point adjustment for
11 sophisticated means. I think that probation rejected it
12 essentially by taking too narrow a view of what the guidelines
13 provide.

14 The defendants' conduct in this case went well beyond
15 a simple fraud. A simple fraud in the context of this case
16 would have been making the payments and causing the false
17 certifications to be submitted. They did that, and they did it
18 intentionally, but their other conduct was designed to conceal
19 the source and the true nature of the payments. It included
20 phony invoices, indirect movement of money, and in the case of
21 Mr. Dawkins and Mr. Code, the use of the second and secret
22 telephone that was referred to at trial as the bat phone, and
23 was in my judgment yet another means to conceal what was truly
24 going on to hide what they were doing. So, this is well beyond
25 the garden variety wire fraud, and it warrants the upward

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1 adjustment.

2 The upward adjustment in this case finds ample support
3 in the cases. I could cite a lot, but I will just refer to
4 two: United States v. Fofanah, 765 F.3d 141 and United States
5 v. Loles, 628 Fed. App. 7, both in the Second Circuit. Fofanah
6 said, among other things, that the creation and use of false
7 documents and other tactics to conceal offense conduct are
8 indicia of the sophistication of the offense. I think that
9 applies here. I don't want to be misunderstood as necessarily
10 concluding that an adjustment for sophisticated means in this
11 case is required as a matter of law. I think, rather, it's
12 permitted, and I think it's appropriate in the exercise of my
13 discretion. So, that takes care of that piece of it.

14 Then we have the loss issue, the question of whether
15 there should be any upward adjustment for the amount of loss.
16 Both sides agree the relevant loss is the intended loss. They
17 certainly don't agree on what the intended loss was. The
18 defendants, as I understand it, argue that it's zero or, worse
19 case, the sum of one year of scholarship support for each of
20 the four players or athletes that everybody agrees are the
21 appropriate focus. The government contends it's four years of
22 scholarships. I've read what you had to say. I'm happy to
23 hear any further discussion at this point.

24 MR. SCHACHTER: We have nothing beyond our papers,
25 your Honor.

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1 MR. MOORE: The only point I would make in response to
2 what your Honor said, that at least for my client, as I think
3 for Mr. Dawkins, it's just one school, it's not four players,
4 it's just one player, that's Mr. Bowen.

5 THE COURT: You're right, and I understand that.

6 MR. MOORE: Yes, sir. But other than that, your
7 Honor, we rest on what we said in our papers. I know your
8 Honor understands the issue.

9 THE COURT: OK. Mr. Haney?

10 MR. HANEY: I would agree with Mr. Moore that it does
11 relate only to the matter with Louisville, and we have
12 articulated in the papers as well.

13 THE COURT: Thank you.

14 Now, I should say that unless I am surprised
15 significantly in the course of the proceedings this morning,
16 the resolution of this is going to be immaterial. I think the
17 same is likely true as to the ruling I've already made on
18 sophisticated means. I think by the end of the morning it may
19 well be clear that the sentences I impose -- though I reserve
20 judgment until the last second -- will be within any of the
21 guideline ranges that would result on any combination of these
22 potential adjustments or none at all, or that I would vary to
23 reach them in any case.

24 That said, my view of the loss is that I agree with
25 the government and probation. The intended loss in my view in

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1 fact was four years of scholarships for these players.
2 Certainly there was a loss of scholarship money. The only
3 serious question, in my view, was the one year/four year
4 assessment. The government argues four because these were four
5 year scholarships -- of course, there were circumstances in
6 which it might not work out that way -- that were conceivable.
7 But the intention was that these individuals received those
8 scholarships. In several cases they were \$40,000 a year; in
9 one case they were \$20,000 some a year.

10 The defendants' fallback position on this, the one
11 year argument, appears at page 35 of Mr. Gatto's brief, in
12 footnote 5, in which the assertion is made that the record
13 demonstrates that Mr. Gatto and his codefendants expected that
14 the student athletes would each be "one and done" players -- I
15 think everybody here knows what that means -- who would receive
16 only one year of scholarship funds before moving on to the NBA.
17 The record, in my view, does not in fact support any such
18 thing. The brief cites two parts of the transcript as
19 supposedly establishing that these fellows all would have been
20 "one and done" players, and that was the only intention of the
21 defendants. Those references do not even come remotely close
22 to establishing any such thing.

23 The first is at page 622 of the trial record, and I
24 will read it because it's quite short. The witness was
25 Mr. Bowen, Sr.

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1 "Q. Mr. Bowen, you and Mr. Dawkins both use a phrase "one and
2 done." What does that mean?

3 "A. That's going to college for one year and then going to the
4 pros the next year.

5 "Q. When you said Tugs" -- referring to Tugs Bowen -- can be
6 one and done, what did you mean by that?

7 "A. He can go to school for one year and then get drafted.
8 It's possible."

9 That certainly doesn't prove that anybody intended
10 that that is what was going to happen or thought it likely.

11 The second reference is at page 820, and it's during
12 the cross-examination of a witness named Doyle, and it referred
13 to Dennis Smith, Jr. at North Carolina State, who by that time
14 had in fact played only one year at NC State and then gone on,
15 I believe, to professional basketball. But that's after the
16 fact. In hindsight -- and it certainly doesn't establish the
17 proposition that these defendants, any of them, intended these
18 folks to go to college for only one year. Thus, I reject the
19 one year option. I certainly reject the no loss option for
20 reasons that are implicit in what I have said already.

21 Now, in light of those rulings, I believe the correct
22 calculations are that Mr. Gatto's adjusted offense level is 23
23 and his guideline range is 46 to 57 months; and the guideline
24 ranges for Mr. Code and Mr. Dawkins are 30 to 37 months in each
25 case, with an adjusted offense level of 19. And have I got my

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1 arithmetic and references right, counsel? Mr. Schachter? Mr.
2 Diskant? I know you don't agree with the bottom line, speaking
3 to the defense.

4 MR. DISKANT: We think you calculated that OK.

5 MR. SCHACHTER: Yes.

6 MR. MOORE: Based on your Honor's ruling, that is the
7 correct guidelines range for my client.

8 MR. HANEY: I would agree, your Honor.

9 THE COURT: Just so nobody is at risk of a heart
10 attack, that's not what I propose to do. I don't propose to
11 sentence in that range. We're going to talk about it more, but
12 I must calculate the guideline range as I see it, and I've done
13 it. And I would also point out, as I've said before, the
14 rulings I made will turn out to be academic.

15 That said, I think we can move on and hear from
16 counsel and the defendants, and then hear from the government.

17 So, Mr. Schachter, on be on behalf of Mr. Gatto.

18 MR. SCHACHTER: Your Honor, when I was a prosecutor I
19 was always relieved that my role at sentencing was mostly to
20 provide what I believe the sentencing guidelines stated and
21 provide the court with facts that I thought were important, and
22 I was relieved that I did not have to be the one wearing the
23 robes and shouldering the burden of deciding what sentence
24 should be imposed. Sentencing always seemed to me to be one of
25 the most daunting parts of an already incredibly challenging

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1 job.

2 How does the court decide when justice is served by
3 locking a person in prison, separated from their family and
4 their community? What is the right amount of time that a
5 person needs to be incarcerated in order to serve the interests
6 of justice? I cannot imagine a more challenging decision that
7 any human being would need to make.

8 There are just a few things, your Honor, that I want
9 to emphasize that I think would be important to the Court's
10 decision. I want to emphasize what a good and decent person
11 Jim is, and what a wonderful family that he and his wife Rachel
12 have built.

13 Jim and Rachel met in college and have been married
14 for 20 years. They have two young children who are in the
15 courtroom today: Grace, who is 14 and Jack, who is 17. Jim is
16 a loving father who is deeply involved in their lives. He's
17 the one who cooks the meals; he volunteers for class trips; he
18 coaches their basketball teams; he is the cornerstone of their
19 family.

20 THE COURT: Excuse me for one moment. I just don't
21 want you to think I'm totally distracted.

22 Andy.

23 Excuse me a minute. I'm looking for something. Go
24 ahead, Mr. Schachter. I'm sorry.

25 MR. SCHACHTER: Thank you, your Honor. Unlike many

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1 white collar defendants, Jim and Rachel live comfortably, but
2 they are not wealthy people by any means, and most importantly
3 their lives are not focused on striving for money.

4 After 25 years with Adidas, Jim made a salary of
5 \$139,000. Rachel has worked as a sales associate at Ann Taylor
6 for 20 years. Their lives revolve around their children and
7 their extended family, Jim's parents and sister, many of whom
8 attended a lot of the trial in order to show their support for
9 Jim during this very difficult time, and are also in the
10 courtroom today.

11 We hope, your Honor, that the letters submitted to the
12 Court provide a picture of the man that Jim is. He is a good
13 family man who is kind to others, a hard worker who has made a
14 lot of lives better. He has never committed a crime. This has
15 been the first time in his life that he has ever had a brush
16 with law enforcement. He has led a good, honest life that
17 anyone would be proud of, and we submit that the good life that
18 Jim led merits the Court's mercy here.

19 There are also a number of things about this case
20 which we hope the Court will see as different from a vast
21 majority of criminal prosecutions and will enable the Court to
22 treat Jim differently. Most importantly, unlike a vast
23 majority of white collar defendants, Jim did not do the things
24 that he is convicted of out of greed; he wasn't hurting others
25 with the purpose of lining his own pockets, as the Court sees

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1 in so many white collar cases.

2 There are many other ways that we submit this case is
3 different but, as I said earlier, we have come to know that
4 your Honor reads and absorbs everything that is in the parties'
5 papers and that nothing escapes the Court's attention, so I
6 won't repeat what we have put in writing.

7 I will close with this: No sentence is necessary to
8 make sure that Jim Gatto is punished for his actions. Short of
9 being diagnosed with a fatal disease, I cannot imagine a life
10 experience which is more painful than standing trial, having
11 been charged with a federal crime. From the moment that Jim
12 was charged, his life has been turned upside down. He knew
13 from that moment that nothing about his life would ever be the
14 same. He lost his job, his reputation, his livelihood. He has
15 needed to worry about how he will ever provide for his family.
16 He has had to consider each day as the trial approached, and
17 then during the trial, he has had to consider that he may be
18 separated from his wife and children, that he won't be able to
19 be there for them, to raise them, to watch them grow.

20 I cannot imagine the pain and incalculable stress that
21 he has suffered. If Jim Gatto never spends a day in prison, he
22 has been punished in ways that most will never have to endure,
23 and we ask that your Honor take all of this into account in
24 fashioning a just sentence for a good and decent man. Thank
25 you, your Honor.

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1 THE COURT: Thank you. I think I will hear all the
2 lawyers first and then hear from the defendants.

3 Mr. Moore?

4 MR. MOORE: Yes, your Honor. Thank you. I will try
5 to be brief, and your Honor will be the judge as to whether I
6 succeed.

7 Like Mr. Schachter, I was a prosecutor actually for a
8 very long time, and I started when the guidelines were
9 mandatory, and I was very pleased when the guidelines no longer
10 became mandatory and judges like your Honor could look not only
11 at the offense and the facts that you heard in a trial, but
12 could actually look at the person who came before you and make
13 decisions about an appropriate sentence based on the person.

14 You didn't hear from Mr. Code during this trial. You
15 don't know the Merl Code that perhaps I have come to know, but
16 I do hope, your Honor, that the letters that you received shed
17 some light on exactly who Merl Code is. He is 45, he is
18 married to his wife Candace, who is here today; she is an
19 occupational therapist. He has two children, one of whom was
20 born during the pendency of this case. He is a loving and
21 doting father.

22 You know, one of the things that struck me about
23 Mr. Code, when we were up here preparing for trial, Candace
24 brought August with her for several days, and at a period of
25 time what I would think is one of the most stressful time in a

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1 person's life, he spent so much time with that young child.
2 And the bond I saw between the two of them was very special,
3 and I could think -- I thought what a great father he is; he
4 has handled this case with grace and dignity and probably far
5 more grace and dignity than I would be able to handle if I were
6 going through what he is going through.

7 I know you read our papers. I know you don't need me
8 to summarize what the letters say about Merl as a person. Here
9 with him today is his wife Candace, his father Mr. Code, who is
10 my cocounsel, his mother Denise and his sister.

11 I could spend an awful lot of time talking about the
12 offense here; I'm going to try not to. I would say that it is
13 something of an unusual offense. It's not an offense that you
14 see lots of people convicted of similar offenses. And there
15 has been evidence -- and we have touched on this in our papers,
16 and the Rice Commission bore this out -- that the conduct here
17 has been going on in college basketball for a long, long time.
18 And there is no evidence that Mr. Code -- unlike some others in
19 college basketball -- really profited from doing what he did.
20 And he did what he did, your Honor, and there is no getting
21 away from it. OK? But he did not make any money. He was a
22 consultant with Adidas, he did what he thought his employer or
23 client wanted him to do, and he got no bonuses or awards from
24 it.

25 Now, I know that the government has pointed out in

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1 their papers that there was some talk between he and
2 Mr. Dawkins about the fact that perhaps at some point they
3 might secure these folks as clients. That's all speculative.
4 The bottom line is he didn't make any money from his
5 participation in the payments to Mr. Bowen.

6 And I would point out, your Honor, that like
7 Mr. Gatto, his life has been turned upside down. Not only did
8 he not profit from this offense; he has been financially
9 devastated by it. He was not indemnified by Adidas; they
10 canceled his contract. He has made almost no money from any
11 source since he was arrested, and he now faces a racketeering
12 suit in the District of South Carolina where we're from. He
13 truly has been financially devastated.

14 THE COURT: State or federal?

15 MR. MOORE: Federal, your Honor, before Judge
16 Anderson -- in Columbia, actually.

17 I can't help but mention here that in this particular
18 case the universities here -- I guess if we were trying this in
19 equity, we may perhaps invoke the doctrine of unclean hands.
20 I'm going to focus on Louisville because Louisville was the
21 school in which Mr. Bowen was going to attend. And, as your
22 Honor will recall, there was some evidence that assistant head
23 coach Kenny Johnson and assistant head coach Jordan Fair were
24 involved, and yet they have not been prosecuted. And Adidas
25 had financial contracts with Louisville through which

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1 Louisville obtained millions of dollars in benefits each year.

2 One of the things that I found a little interesting is
3 that since this prosecution was concluded, what you have not
4 seen is you have not seen Louisville or any of the other
5 schools try to get out of their contracts with Adidas. And so
6 I think that when you look at that, your Honor, when the
7 schools talk about the losses that they have suffered, it
8 reminds me of something a wise man once told me: Don't just
9 listen to what people say; listen to what they do.

10 You have before you a 45 year old man with absolutely
11 no criminal history. I talked about the fact that he is a
12 loving, caring father. And when you read the letters that were
13 written to your Honor, I think one of the things that sticks
14 out -- and it really rings true for the Merl Code that I have
15 come to know -- is that he is someone who really cares about
16 young people and cares about people.

17 One of the things that you don't know, your Honor, is
18 that shortly before this trial my mother lost her fiancée of
19 four years, and my sister and I, trying to distract her, I took
20 her to another trial I had a month before this one, and then my
21 sister brought her here. And she observed some of this trial.
22 Now, my mother lives about 30 miles from the Codes. She had
23 never met any of them before, but my mother -- who is one of
24 the best judges of character and one of the best people that I
25 will ever meet -- with the possible exception of your Honor --

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1 THE COURT: That Southern charm.

2 MR. MOORE: I do think your Honor is a very good judge
3 of character.

4 THE COURT: It's not going to help.

5 MR. MOORE: Well, you can't fault me for trying.

6 THE COURT: It won't hurt either.

7 MR. MOORE: So long as it doesn't hurt, Judge.

8 One of the things, my mother became very, very close
9 to the Code family, and there is not a day that goes by that
10 she doesn't ask me about them. Over the holidays, Thanksgiving
11 and Christmas, she wanted to call them on those holidays, and
12 she just absolutely adores every person in the family. And I
13 think she is a really good judge of character, and I think that
14 speaks a lot more to me about them than my own observations,
15 because maybe sometimes I am not as good a judge of character
16 as my mom.

17 I would suggest, your Honor, that a sentence of
18 incarceration is not necessary in this case to reflect the
19 seriousness of the offense, to promote respect for the law or
20 to provide just punishment. Merl Code has already been
21 devastated. You will never see him again. No other federal
22 judge will have to deal with Merl Code ever again. Merl Code
23 is embarrassed about the fact that he had to stand before a
24 federal judge. And I know he is charged in a separate offense,
25 but we're dealing with that in April.

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1 My point is that you will never have to worry about
2 seeing Merl Code again. And as to general deterrence, all that
3 anyone has to do if they want to make a decision about how not
4 to do what has been charged in this case, is look at the
5 consequences that have been meted out to Mr. Code, because
6 again he has been devastated.

7 I could spend a lot of time talking about unwarranted
8 sentencing disparities, but I know your Honor has read the
9 papers. Your Honor doesn't need me to remind you of some of
10 the exhibits that were entered into evidence and offered into
11 evidence, perhaps not admitted, about other folks who were
12 involved in similar conduct but have evaded and escaped
13 prosecution. And I would respectfully suggest that that is
14 something that the Court ought to consider in meting out an
15 appropriate sentence.

16 I can tell you that if Merl Code had to do it over
17 again, if he thought that anyone would ever conceive that what
18 he did here was a crime, he would have never done it. He
19 values his relationships with his friends, his relationship
20 with his wife Candace and his role as a loving and present
21 father to his sons too much to risk that. He is sorry for what
22 he did, and I simply ask that your Honor take all of this into
23 consideration when your Honor passes sentence.

24 THE COURT: All right. Thank you.

25 Mr. Haney?

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1 MR. HANEY: Thank you, your Honor. Your Honor,
2 myself -- as with Mr. Schachter and Mr. Moore -- also as a
3 former prosecutor, I to tell young men like Christian Dawkins
4 it's very easy to get into trouble; it's very difficult to get
5 out of trouble, and this perhaps is a cautionary tale for those
6 that would disagree.

7 Your Honor, Christian Dawkins stands before this court
8 because he made poor choices, period. He made those choices of
9 his own volition, and if he had not, he would not be standing
10 here today. That I know.

11 Now, back in October we regrettably lost a hard fought
12 battle that rule breaking was not law breaking. Today is not a
13 whining, deflecting, relitigating or excuse making, but instead
14 a day of ownership and accountability, and with ownership comes
15 acceptance, reactions and the realization there are
16 consequences for bad choices, and that is where Christian
17 Dawkins stands today.

18 Christian Dawkins, your Honor, also stands before the
19 Court uniquely distinguishable, I would submit, from his
20 codefendants in that at the time of his actions he was 22 years
21 old. Certainly, we all know as men part of growing up and
22 becoming a man is part of failing, falling down and making
23 mistakes. Your Honor, we all have -- every man sitting in this
24 courtroom today has fallen down and made mistakes, and I would
25 even bet that your Honor has too. It is a cycle of growth and

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1 an evolution of manhood, your Honor. Regrettably for Christian
2 he made were deemed by a jury of his peers to be federal
3 crimes. For that, these mistakes are going to come at a far
4 greater price for Christian. But we respectfully ask the Court
5 at least to give some consideration, if not some degree of
6 deference, and understand that at the age of 22 years old there
7 is an undeniable reality that mistakes are going to be made
8 that perhaps would not have been made with greater maturity and
9 life experience.

10 Now, the request of this consideration in no way
11 trivializes, justifies, excuses, or discounts the conduct that
12 occurred; it is merely asking your Honor to review this conduct
13 in its proper light.

14 Now, as noted in our sentencing memorandum as well,
15 and the submission of character letters, Christian has
16 tremendous community and family support, many of whom are in
17 the courtroom today. Undoubtedly, the gravity of this matter
18 has taught him at the very young age the importance of playing
19 by the rules; and perhaps just as important is surrounding
20 yourself with good people and good mentors. Because of his
21 age, he has been an easy target for the national media, truly
22 an infamous figure in the annals of college basketball, and has
23 been vilified, perhaps in some ways deservedly so. But one
24 thing is for certain, your Honor, his young life will never be
25 the same. Now a convicted felon, it is likely if not certain

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1 he will never work again in the business of basketball, and
2 must find a new direction in life, with monumental barriers
3 that lie ahead.

4 In short, Christian Dawkins's poor choices have
5 altered a young and promising career of a man in his early 20s,
6 whose real punishment would never be a term of incarceration
7 but certainly will be a lifetime of regret.

8 Your Honor, I would submit that the sentiments that I
9 am offering here today are not mere zealous advocacy of a
10 biased lawyer. Mr. Dimaria from the probation department also
11 in his presentence interview and subsequent report highlighted
12 many of the factors that I have offered for consideration to
13 the Court today and made a substantial guideline recommendation
14 of a downward departure.

15 Your Honor, I will close with this: I have known
16 Christian Dawkins over half his life, his family longer. I
17 call his dad my brother more than my own because he is. I have
18 watched Christian grow and evolve into a young man, a civic
19 leader, an inspiration and a shining example of other young men
20 in very socially and economically challenged community. Your
21 Honor, I know Lou and Tish Dawkins did not raise a criminal --
22 that I know, not on their watch -- and I respectfully ask the
23 Court to consider sparing this young life in a manner that a
24 noncustodial sentence would afford. Thank you, your Honor.

25 THE COURT: Thank you.

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1 Mr. Gatto, you have the right to speak. Is there
2 anything you would like to say?

3 DEFENDANT GATTO: Yes, your Honor.

4 Your Honor, thank you for the opportunity to address
5 you today. The game of basketball has been a part of my entire
6 life and is part of my DNA, but the fact is, your Honor, I
7 didn't play by the rules of that game, and my actions and poor
8 judgment have had terrible consequences, including on my
9 family, who are the ones I am most worried about today.

10 My parents who are here today -- as they were ever day
11 of the trial -- raised me to conduct my life personally and
12 professionally with integrity, respect and concern for others.
13 I believe wholeheartedly in those lessons, and I wish I had
14 executed better judgment in this instance.

15 I am disappointed in myself with my actions, and that
16 is something that I will live with for a very long time.
17 Although I am very scared about the prospect of going to
18 prison, my real fear is not for myself but merely for my son
19 Jack and my daughter Grace. They both have already suffered
20 enormous stress and strain, and I almost can't bear to think
21 about our family being torn apart and the impact on them.

22 The well being of my family has been my motivation
23 since I got married and had children. It is a helpless feeling
24 for me, because I have always tried to take care of them as
25 best I can, but I recognize that I soon may not be able to do

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1 so.

2 My son Jack turns 18 in a few days and on his way to
3 college in the fall. My daughter Grace is about to finish her
4 freshman year of high school, and my wife of 21 years, Rachel,
5 is the love of my life.

6 Even though I have made mistakes and, as a result, put
7 them through something that no family could ever imagine, they
8 have not abandoned me. I want them to know that I will always
9 believe in them, and I will forever be their adoring father and
10 husband, and I will continue to spend my lifetime loving them
11 even if we are separated, as difficult as that would be.

12 Your Honor, I deeply regret my actions, and I want you
13 to know that I am more than what you heard during the trial.
14 You have received many letters from my family, friends and
15 coworkers, for which I am grateful and full of emotion. I hope
16 the letters give you insight on what kind of person I really
17 am. I know you must issue a sentence today, and I wish to
18 thank you for whatever consideration you can give to my family
19 and my words here today.

20 Thank you again for your time.

21 THE COURT: Thank you.

22 Mr. Code?

23 DEFENDANT CODE: Yes, your Honor. Thank you for
24 allowing me to speak to the Court today.

25 I would like you to know that I deeply regret what has

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1 brought me before you today. I have been very fortunate in
2 that I played the game at all levels -- Little League, high
3 school, college and professionally abroad -- and while I love
4 the game, I really feel there are some things that need to be
5 changed about college basketball, and hopefully after I put
6 this episode behind me, I will be able to help families and
7 young men.

8 I regret the pain I have caused my family. I want to
9 thank them for their support and their love throughout this
10 entire process. My wife has stood by me. My mother, my father
11 and my sister, my community, my friends, and even some folks
12 who are still in the basketball business, have all reached out
13 just to say they love me and they appreciate the struggle.
14 Even though they haven't had to go through it themselves, they
15 can appreciate what I've had to deal with.

16 So, I thank you for allowing me to speak to you today.
17 I appreciate your consideration in reading the letters that
18 have been brought before you. I hope they give you some
19 insight as to who I am as a man, who I aspire to be as a
20 father, and I respect the authority of the Court and pray that
21 you will have leniency on me not just for the sake of myself
22 but for my wife and two sons. Thank you for your time.

23 THE COURT: Thank you.

24 Mr. Dawkins.

25 DEFENDANT DAWKINS: Your Honor, thank you for the time

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1 to say a few words here today.

2 Your Honor, I stand here today realizing the
3 situation, and my choices have not just impacted my life but
4 those closest and dearest to me. That reality hurts me beyond
5 any words I can offer to the Court. My remorse is not for
6 myself but for the pain and embarrassment I have caused others.
7 I realize now more than ever that none of this was worth it.

8 I was raised by my parents to accept the consequences
9 of my own actions, and even though I was offered the chance to
10 do so, I never pointed the finger at others in this case to
11 make it easier on me. In my quest to get ahead, I broke rules
12 and made some really bad decisions. Nobody forced me to do
13 either.

14 Over the last 18 months I have learned a lot about
15 life, friendship and loyalty that I wish I could have instead
16 read in a book. My personal feelings about the social
17 dysfunction of college basketball and the inequity in what I
18 believe is a system that takes advantage of kids and their
19 families undoubtedly clouded much of my judgment but really
20 what was allowed me in my mind to justify my own actions.

21 There was a point I decided to play by my own set of
22 rules and not those that I willingly and knowingly broke. For
23 that I was wrong then and I stand wrong today.

24 My intentions were never to hurt anyone, but I realize
25 that in the end I did. So, I will stake this very difficult

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1 experience, learn from it and become a better person.

2 Thank you.

3 THE COURT: Thank you.

4 Mr. Diskant.

5 MR. DISKANT: Your Honor, just a few brief comments in
6 response. You know, your Honor noted in the context of
7 calculating the guidelines -- which of course, the Court has to
8 do -- that in this case they are or may prove to be in some
9 respects immaterial. And I confess that as I was thinking
10 about the sentencing in this case I had the same conclusion.

11 Leaving aside whatever sentence gets imposed, the
12 guidelines here and the statutory and guidelines calculation of
13 loss really doesn't begin to capture the harm that these
14 defendants caused.

15 Certainly the value of the scholarships, as the Court
16 has now concluded, is properly attributable to them as a loss
17 for purposes of guidelines, but as each of the universities --
18 both through their representatives who testified during the
19 trial, and also in the victim impact statements that they have
20 provided to the Court before today -- detail a far broader
21 range of harms, both tangible and intangible, that have
22 unquestionably befallen them as a result of the defendants'
23 conduct.

24 The University of Louisville, for example, talks about
25 its efforts to build itself as a university, getting its first

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1 Rhodes Scholar in 2009. It describes itself as a school that
2 is so much more than as basketball team, and yet has been
3 relegated to a national scandal as a result in large part to
4 the defendants' conduct. There are, of course, tangible harms
5 as well.

6 THE COURT: Well, they were involved with some
7 problems before, weren't they?

8 MR. DISKANT: They were, your Honor, but
9 respectfully -- because I think this is a point that the
10 defendants raise as well -- you know, I think it is a fine line
11 to walk in blaming a victim for being revictimized. There is
12 no question that the University of Louisville had difficulty in
13 the past, but they didn't invite this, they didn't want this,
14 and they didn't deserve it.

15 As North Carolina State University writes in its
16 letter to your Honor -- which is certainly true -- and that is
17 a university that highlighted its various efforts to support a
18 compliance mission -- there is no detection technique to
19 identify an individual who intentionally chooses to violate an
20 NCAA rule and then hides the misconduct from both the
21 university and the NCAA. There is virtually nothing that
22 Louisville could have done differently to prevent this from
23 happening, and respectfully I don't think it is fair to blame
24 them in effect for this having befallen them as a result.

25 More broadly though -- and the defendants are

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1 certainly not the only ones responsible for this -- but there
2 are a whole number of young men who have suffered, you know,
3 very, very serious harm as a result of the defendants' conduct:
4 Student athletes who will never play in the NCAA because of the
5 scandal associated with them as a result of this conduct;
6 entire teams that were left without players they were counting
7 on; young students who were planning on supporting their
8 school's athletic program that particular year, that were left
9 with a team that had been substantially tarnished, all
10 unquestionably harmed as a result of the defendants' conduct.

11 Let me talk a little bit about the notion that, you
12 know, everyone is doing it or that these kinds of violations
13 are rampant, you know, as Mr. Gatto puts in his submission,
14 that his conduct is indistinguishable from that of many, many
15 other people who will never see the inside of a cell. We would
16 beg to disagree with that. And let's be clear, there is no
17 question that there is a long and unfortunate history
18 undoubtedly of boosters giving a few hundred or a few thousand
19 dollars to kids here and there. This is something
20 fundamentally different. This is something that when the world
21 learned of it in September of 2017 was rightfully considered to
22 be shocking, to be extraordinary, to be brazen. It is in many
23 respects unprecedented in its sophistication, in its
24 coordination, and with respect to Mr. Gatto in particular, in
25 its repetitive nature over a period of time.

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1 Those are all factors that prompted the NCAA to
2 convene the Rice Commission, the fact that this was so unusual,
3 so outside the bounds of what anyone had expected or thought
4 was possible at the time. And those are factors that we
5 believe very strongly weigh in favor of some sort of a
6 custodial sentence in this case. Indeed, it was cited by the
7 probation department the need for general deterrence in this
8 matter -- which is really what this point gets to -- as the
9 paramount factor that the Court should consider in imposing
10 sentence, and we agree with that.

11 Finally, let me talk about the defendants as
12 individuals and their motivations for engaging in this conduct.
13 The Court doesn't need to make a factual finding as to whether
14 any one of them in particular was greedy -- which is a word
15 into they have each taken umbrage with -- but there is no
16 question that each of these defendants were acting for personal
17 and competitive advantage. With respect to Mr. Gatto, it was a
18 core part of his job to recruit and sign top-tier student
19 athletes once they became professionals, and this gave him a
20 leg up in connect withing that student athlete and his family
21 at a young age.

22 For Mr. Code, for Mr. Dawkins, same thing, they were
23 in the business of signing young student athletes, or at least
24 they hoped to be in the business of signing young student
25 athletes when they became professionals, and facilitating these

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1 payments to their families was a way of developing that
2 connection, by gaining a leg up in their competition to sign
3 these kids once they became pros, something that of course
4 would reap millions for them should it happen.

5 But more generally the defendants talk -- and the
6 letters that I have read, and I am sure the Court has read,
7 speak in glowing terms of people who have led in many respects
8 led very commendable lives, and the government does not in any
9 way, shape or form mean to dispute that each of the defendants
10 has done commendable things with various parts of his life.
11 But the descriptions in those letters and the descriptions the
12 defense counsel would leave the Court with, are simply at odds
13 with some of the conduct in this case.

14 Jim Gatto over a period of years was abusing his
15 position at Adidas, his control over a multi-million dollar
16 budget, and routinely approving large cash payments to the
17 families of student athletes. He knew he shouldn't and
18 couldn't be doing that, so he approved fake invoices and
19 documents ostensibly justifying these costs as legitimate
20 Adidas expenses to cover his tracks.

21 Merl Code was on the front lines brokering these
22 illicit deals for Adidas. He was the one creating some of
23 these invoice, helping to route the money indirectly through
24 his friend's AAU team account. And as the trial evidence shows
25 with respect to the Miami scheme -- the last scheme before the

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1 defendants were arrested -- he was prepared to lie even to his
2 coconspirators, to Mr. Gatto, in the hopes of siphoning off
3 some of the money that Mr. Gatto thought was going to the
4 family of another student athlete.

5 And finally there is Christian Dawkins, who lost his
6 job at ASM after racking up tens of thousands of dollars in
7 unauthorized credit card charges on a client's credit card,
8 that prompted him to want to go out on his own to facilitate
9 and broker these deals on his own, he was the one who used the
10 bat phone, he was the one who made all of these various offers
11 and brokered all of these various offers for Brian Bowen, Sr.,
12 and he himself described the payments he was working to
13 facilitate on a call played at trial.

14 I leave the Court simply with this, because again the
15 government would not question that these are men who have done
16 great things in their lives, but for better or for worse they
17 have also lost their moral compass at various points, and that
18 is what this trial was about, that is what we believe is
19 warranting a punishment including a term of incarceration.

20 THE COURT: Thank you, Mr. Diskant, and thank you all.

21 If one doesn't know it before one has the privilege
22 and the duty to sit in judgment of other human beings, one
23 learns it very quickly. There aren't any saints, and there
24 aren't any pure sinners on this earth, not one. The question
25 is what the mix is in individual cases. I have been here for

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1 almost 25 years. I have sentenced murderers who were great
2 family men, I've seen a lot of things, and in that respect this
3 case really isn't any different at all.

4 I certainly accept that all three of the defendants
5 have lived good and productive lives in almost all respects.
6 From what I understand, they are terrific in their families,
7 and in most cases in their communities. I also surely
8 understand that each of them has suffered enormously simply by
9 virtue of the prosecution and the trial -- aggravated of course
10 by the jury's finding -- and I don't think there is any need to
11 impose a sentence which is so often required and in many cases
12 that I see to put these three men away so that they don't do
13 any harm to anybody else. They're not going to; they've
14 learned their lesson; and that truly argues for leniency, and
15 within limits I intend to grant it.

16 I assume also -- although I want to be clear I'm not
17 making any finding on the point -- that conduct such as what
18 happened in this case has occurred with some frequency --
19 possibly to understate it significantly -- although in other
20 cases the incidents I have heard rumor of in the evidence
21 involved in most cases a lot less money. I don't buy the
22 argument that that means I should impose a lenient sentence to
23 avoid unwarranted disparities, because when the sentencing
24 guidelines and the statute talk about unwarranted disparities,
25 they're talking about disparities in sentences, not disparities

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1 that result because somebody else didn't get caught and you
2 did, which is what we're mostly dealing with here.

3 (Continued on next page)

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1 THE COURT: (Continuing) Nonetheless, I certainly
2 understand that this prosecution was possibly the first and, in
3 any event, one of a very small number of prosecutions for
4 conduct anything like this, and I take that into account.

5 There is a problem in taking it into account, though,
6 because it cuts both ways. Sure, I understand the defendants'
7 arguments, why should they be punished when other people
8 presumably have done similar things and gotten away with it and
9 not been prosecuted. I understand that argument. And to some
10 degree, I have some sympathy with it.

11 But it cuts in the other direction, too. There is
12 really a serious need to impose a sentence that will be
13 sufficient to deter others, to make other people think more
14 than twice before engaging in this kind of behavior. And I am
15 going to try and walk the line between fairness and appropriate
16 leniency on the one hand, and fulfilling my duty to impose a
17 sentence that will be a great big warning light to the
18 basketball world.

19 The "everybody's doing it" argument, in short, is not
20 a get-out-of-jail-free card. And I happened to come across,
21 from preparing for this morning, a Second Circuit case that
22 dealt, I believe, with a tax evasion prosecution, but it
23 doesn't really matter. The issue was whether the means that
24 had been used to carry out that particular tax evasion was
25 sophisticated or not. And the court of appeals said, you know,

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1 we really have to take into account -- and the sentencing
2 commission took into account -- the fact that the incidents of
3 tax evasion in the United States is much greater than the
4 number of criminal tax cases that get brought. And therefore,
5 enhanced sentences are appropriate, sometimes, to deter all
6 those folks out there.

7 Now, I understand it was under a slightly different
8 guideline, but the point nonetheless is valid. If this is the
9 only prosecution of its kind thus far, and I guess we still
10 have two pending that are comparable, it's important that I
11 reflect the need for general deterrence here.

12 The next point I want to make is that these defendants
13 all knew what they were doing was wrong. Make no mistake about
14 it. They took very substantial steps to conceal what they were
15 doing. It reflects their knowledge that it was wrongful
16 conduct.

17 One of the pretty unforgettable moments during the
18 trial was listening to a recording of a conversation which, if
19 memory serves, someone will correct me if I don't get it right,
20 was between Mr. Code and Mr. Dawkins, and I think the subject
21 of it was whether the coach at Louisville knew what they were
22 doing. And one of them said, well, he knows something, but he
23 doesn't know everything. And the other person said something
24 that sort of suggested that he didn't understand why he knew
25 something, but he didn't know anything or what doesn't he know.

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1 And the other party to the conversation, the one who said he
2 knows something, but he doesn't know everything, said, no,
3 we've got to give him plausible deniability.

4 I will never forget that line. They knew it was
5 wrong, they were covering their tracks, they were making sure
6 Rick Pitino's tracks were covered, to the extent they could.
7 And why were they protecting Rick Pitino? They knew. They
8 knew he was out if he got caught with this.

9 And in any event, regardless of what Rick Pitino did
10 or didn't do, and I certainly make no finding about that, I
11 didn't hear that case, if there ever is a case. The point of
12 it is these men knew what they were doing, and they knew it was
13 wrong, and they were covering it up.

14 Other point I want to mention is I don't fully accept
15 Mr. Schachter's argument and those of the other defense lawyers
16 about economic motives. Now, I don't want to overstate this.
17 I know that none of these three men took home a nickel extra as
18 a result of committing these crimes for which they were
19 convicted. But that doesn't mean that there were no economic
20 motives.

21 Mr. Dawkins was building a business. He had an
22 economic motive. He was trying to land Tug Bowen, ultimately,
23 as an NBA player client. That's what this was about from his
24 point of view.

25 Mr. Code was a consultant, basically, an at-will

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1 employee of Adidas. What was he doing there? His job was to
2 bring in players. Players to Adidas schools. His paychecks
3 depended on how successful that was, not only in amount, but in
4 duration. Were they going to keep him on.

5 And what was said about Mr. Gatto is right. I mean,
6 to call him "greedy" would be wrong. It would be an
7 exaggeration. But to say that he didn't understand that his
8 job was producing players for Adidas-sponsored schools, and
9 then shoe deals down the road to the extent any of them went
10 public, and that's what he was being paid for. And that's
11 ultimately what his job and his family security depended on.

12 I don't mean to exaggerate it. But these are not
13 like, you know, insider traders who are stealing information to
14 make millions of dollars. That wasn't this case. But it's
15 wrong to say there was no economic motive.

16 So I've tried to take all these factors into account
17 as well as all of the other evidence, and I've certainly
18 considered all of the 3553(a) factors, and tried to fashion a
19 sentence that would appropriately reflect the seriousness of
20 the offenses, the nature and characteristics of the defendants,
21 just punishment for what I regard, even though one of the
22 defendants' briefs quarreled with the term, I regard as a
23 serious crime, and to achieve adequate general deterrence. And
24 that, to me, is the driver above and beyond other factors.

25 So the sentences I'm going to impose are, with one

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1 possible exception, lower than any conceivable guideline range
2 that any possible outcome of that analysis could have produced.
3 Because I think that's what's appropriate in this case for
4 these individuals this time only, given all of the
5 circumstances. If this were not the first prosecution of its
6 kind, if the characteristics of these defendants were
7 different, and if other things were different, I might take a
8 very different view of the appropriate sentences. But the
9 sentences I'm about to impose are what I think is right here,
10 and I think they are the right sentences, regardless of what
11 the technical answer to the guideline computation is.

12 The one other thing I think bears mention is one point
13 that Mr. Diskant made. There was a lot greater harm inflicted
14 by this behavior than can be measured in dollars, and
15 Mr. Diskant mentioned some of it. I'll just make an anecdotal
16 comment about it.

17 To me, probably the worst victim, most seriously
18 injured victim of the Louisville scheme was Tug Bowen. Those
19 of you who were at the trial will remember the testimony of his
20 father who brought the whole thing about in a very important
21 way. He broke down in tears on the stand with the realization
22 or acknowledgment that he had wrecked his son's life. He did.
23 He never got the education he hoped to get. He never got an
24 opportunity to play in the NBA. Last I heard, he was playing
25 basketball in Australia. I'm sure it's a great country, but

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1 it's not the life he wanted.

2 Now, Mr. Bowen Senior may have set these events in
3 motion with respect to Louisville. I'm not saying he did, but
4 he may have. He certainly had a significant role. These three
5 defendants, they participated in wrecking Tug Bowen's life.
6 And that's never going to be reflected in money in this case.
7 It's not reflected in the guidelines. And people who commit
8 this crime run the risk of wrecking a lot of other lives. And
9 there are times when the sentencing guidelines, admirable an
10 effort as they are, just haven't anticipated all the factors in
11 human existence that can manifest harm.

12 I remember a case I had many years ago in which
13 somebody would conceal himself in the rare book room at
14 Columbia University, and razor pages out of 600-year-old
15 manuscripts to sell on a black market. And his argument was,
16 well, what's the market value of these pages, that's what the
17 loss amount is. Well, no, it isn't. And no, it wasn't.

18 This is a case, obviously, that has nothing to do with
19 rare books, but the guidelines don't capture it all. And I
20 think we need to recognize some of the things they don't
21 capture.

22 Okay. With that, I'm going to ask the defendants to
23 rise for the imposition of sentence.

24 It is the judgment of this Court that each of you be
25 committed to the custody of the Attorney General of the United

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1 States or his designee for a term of imprisonment, that you
2 thereafter each serve a term of supervised release of two
3 years, that you pay the mandatory special assessment, and that
4 you will pay such restitution as I may impose on the terms that
5 I may impose at a later date, which we're going to talk about.

6 The term of imprisonment in the case of Mr. Gatto is
7 nine months.

8 The term of imprisonment in the case of Mr. Code and
9 in the case of Mr. Dawkins is six months.

10 The special assessment is \$300 for Mr. Gatto, and \$200
11 for each of the other two defendants.

12 The term of supervised release shall be subject to the
13 mandatory and the standard conditions of supervision 1 through
14 13, in addition to the following special conditions:

15 Each of you shall provide your probation officer with
16 any financial information he or she may request, as long as
17 there is any restitution obligation upon you that remains less
18 than fully satisfied.

19 Second, in the event restitution is imposed, you shall
20 comply with the provisions of the restitution order which will
21 involve, assuming it's imposed, a payment schedule.

22 I decline to require drug testing. I don't see a need
23 for it.

24 I advise each of you that you each have the right to
25 appeal from the judgment imposing this sentence. If you wish

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1 to appeal, you must file a written notice of appeal within 14
2 days after the date on which judgment is entered. I'll say
3 another word about that in a minute. If you wish to appeal,
4 and you can't afford to pay the fees necessary to do so, you
5 have the right to apply for permission to appeal as a poor
6 person. If that application were granted, you would be
7 permitted to appeal without payment of the fees. And if you
8 couldn't afford a lawyer, a lawyer would be appointed for you
9 at public expense.

10 You may be seated.

11 With respect to the running of the time for appeal, I
12 am deferring the imposition of restitution because the papers
13 came in so late. We'll fix a date. I leave to you and your
14 lawyers figuring out whether the date of entry of the judgment
15 will be almost immediately, which may occur in one sense, or
16 whether it doesn't occur until the restitution order is
17 entered. I'm not going to give advice on that subject at this
18 point.

19 With respect to restitution, I think what I'd like to
20 do is set a date about 30 days out, more or less, and you can
21 come back together and see where we are on that.

22 Now, Mr. Schachter, you had quite a lot to say about
23 claiming that the government had been too late with its request
24 for restitution. I'm not sure I view it that way. But, I take
25 it that if we defer restitution for another 30 days, the

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1 defendants are happy to withdraw any objection about the
2 government being too late. Or am I mistaken, Mr. Schachter?

3 MR. SCHACHTER: Your Honor, may I have one moment?

4 THE COURT: Yes.

5 (Pause)

6 MR. SCHACHTER: Your Honor, I believe it is our view
7 that, by virtue of the deadlines that were missed, that the
8 Court cannot impose restitution as we read 3664. It only
9 provides delay past sentencing or past the deadlines that are
10 set forth if the victims' losses are not ascertainable by a
11 date that is 10 days prior to sentencing, and the attorney for
12 the government shall inform the Court.

13 And so I believe that by virtue of the government's
14 failure to inform the Court that --

15 THE COURT: You want me to fix it right now? I could
16 do that.

17 MR. SCHACHTER: No. No, your Honor, that's not our
18 request.

19 THE COURT: Listen to the music, Mr. Schachter, not
20 the notes.

21 MR. SCHACHTER: What I would say is nothing about the
22 delay between now and the next 30 days, certainly, we don't
23 believe that would have any impact on the ability to seek
24 restitution.

25 THE COURT: All right. Mr. Diskant?

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1 Do the other defendants join in this?

2 MR. MOORE: I don't know that we're so much affected
3 by it. But I suppose for the record, we'll join in it.

4 MR. HANEY: I would concur. I don't think we are
5 affected either, but I will stay with the seamen.

6 THE COURT: You are all in the same boat, and we'll
7 see whether there is a waterfall on the stream.

8 Okay, Mr. Diskant, I'll hear from you.

9 MR. DISKANT: On that last point, they are not in the
10 same boat. With respect to Mr. Code and Mr. Dawkins, the
11 restitution amount is fixed, there has never been a challenge
12 to it other than the defendants' broad argument that they
13 didn't intend to cause any loss at all.

14 We have prepared orders of restitution for them. The
15 amount is \$28,261. We have provided copies to the defendants
16 and to the Court. I have copies here.

17 As far as the government is concerned, there has been
18 no objection to this amount, which is based purely on the
19 actual loss suffered by the University of Louisville and these
20 can be entered today.

21 MR. HANEY: I have no objection to that.

22 MR. MOORE: I conferred with co-counsel. I don't
23 think I do either. I don't. I'll terminate the qualifier, I
24 don't. As I understand it, the proposed restitution orders say
25 that the restitution is joint and several. Not only between

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1 myself and Mr. Dawkins, but also with Mr. Gatto, whatever
2 restitution order you ultimately impose, as well as
3 Ms. Gassnola, Mr. Sood, and/or any other person who gets
4 convicted of this offense. With that caveat, I join.

5 MR. DISKANT: That is the way the order is drafted.

6 THE COURT: Hand it up, please.

7 All right. I'm signing the restitution orders with
8 respect to Mr. Code and Mr. Dawkins.

9 In the case of Mr. Code, the sentence includes a
10 requirement he pay restitution in the amount of \$28,261, as
11 specified in the order of restitution. Likewise, in the case
12 of Mr. Dawkins, the amount is the same, and is payable as set
13 forth in the order of restitution.

14 Okay, Mr. Schachter, you're in this ship on your own.
15 Mr. Diskant.

16 MR. DISKANT: As an initial matter, the government is
17 not aware of any authority, and Mr. Schachter does not cite
18 any, that suggests that, assuming for the sake of argument,
19 there was a failure to comply with the timing provisions of the
20 MVRA, that that would impose a bar to seeking any restitution.
21 To the contrary, when the Supreme Court has most recently
22 addressed this statute, it has said just the opposite, in the
23 context of interpreting a similar provision. That's the *Lagos*
24 case, which I know the Court is familiar with, which makes
25 clear that the timing provisions of the MVRA are meant to

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1 ensure that the victims get speedy recovery, and not to protect
2 the defendant.

3 Second, if Mr. Schachter feels strongly about this, we
4 could of course have the Court, as the Court has already
5 suggested doing, postpone formally imposing sentence for
6 another 30 days or however much time Mr. Schachter --

7 THE COURT: You mean formally imposing restitution.

8 MR. DISKANT: Either/or. If Mr. Schachter's initial
9 point is because he did not have notice of the amount to be
10 sought 60 days prior to sentencing, we could set the formal
11 sentence of Mr. Gatto 53 days from today.

12 THE COURT: I think he's already been sentenced.

13 MR. DISKANT: Fair enough. The statute has an
14 expressed mechanism for dealing with a situation like this
15 where the dispute over restitution is not resolved at the time
16 of sentencing. It provides for at least 90 additional days.
17 The *Lagos* decision seems to suggest if additional time is
18 necessary beyond that, that is also permissible.

19 Mr. Schachter is on notice of the amount being sought.
20 He has made a request for additional discovery regarding that
21 amount. We are prepared to get that from the victim
22 universities and produce it to him. So consistent with the
23 Court's suggestion, we would recommend that we get that to the
24 victims and come back or at least brief the issue in the next
25 30 days or so.

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1 THE COURT: Well, Mr. Schachter, any change of view?

2 MR. SCHACHTER: May I have just a moment?

3 (Pause)

4 MR. SCHACHTER: Your Honor, as I read the statute, it
5 says that restitution can only be imposed, or the government is
6 required to seek restitution 60 days before sentencing and it
7 can only be delayed under circumstances where the victims'
8 losses are not ascertainable by a date that is 10 days prior to
9 sentencing. Then it requires the government to come forward
10 and advise the Court in advance of sentencing that there is an
11 issue with respect to --

12 THE COURT: And you are the one who wrote me the big
13 long letter the other night telling me you needed discovery
14 because the losses were uncertain. Right?

15 MR. SCHACHTER: I think what I intended to say, your
16 Honor, is simply --

17 THE COURT: I'm asking what you said. Not what you
18 intended to say.

19 MR. SCHACHTER: It is not a matter of us seeking
20 discovery. It was a matter that the restitution claims that
21 were put forward are insufficient to justify an order of
22 restitution.

23 THE COURT: You didn't mention discovery at all, did
24 you. Is that what you are telling me?

25 MR. SCHACHTER: I'm not saying that, your Honor.

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1 THE COURT: Did you write the letter?

2 MR. SCHACHTER: Yes, your Honor.

3 THE COURT: All right. I'll see you on April 9, at
4 10 o'clock in the morning. Mr. Gatto needn't be there.

5 Which comes to the question of bail. Any
6 applications?

7 MR. MOORE: We do have an application, your Honor, on
8 behalf of all three of the defendants for bail pending appeal.
9 And I'm prepared to address that if the Court wishes me to.

10 THE COURT: Let me see if you have any opposition.

11 MR. MOORE: That would be -- I hope we don't.

12 MR. DISKANT: We do oppose bail pending appeal. Not
13 on the basis of either a risk of flight or safety, but on the
14 second prong of the requirement. That is the appeal is likely
15 to raise a substantial question of law or fact.

16 THE COURT: Well, you better address it.

17 MR. MOORE: Yes, sir, your Honor. Do you want me to
18 come to the rostrum?

19 THE COURT: Yes.

20 MR. MOORE: And I will try to be brief, and I hope
21 that your Honor will appreciate that almost all of these cases
22 are Second Circuit cases that I intend to rely on.

23 But we have five basic arguments, and I will try to go
24 over those briefly. Obviously, your Honor knows the standard,
25 I know your Honor has dealt with the issue of appeal bonds

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1 before.

2 The Court shall order the release of convicted
3 defendant if the Court finds by clear and convincing evidence
4 that the person is not likely to flee or pose a danger to the
5 safety of any other person in the community if released. The
6 government has conceded that, as I understand it.

7 THE COURT: I so find.

8 MR. MOORE: So, the issue is that the appeal is not
9 for purpose of delay, and raises a substantial question of law
10 or fact that is likely to result in reversal or a new trial.
11 To be substantial, the question need only be one of substance
12 that would be necessary to a finding it is not frivolous. In
13 other words, it is a close question or one that could very well
14 be decided the other way, or one that is novel.

15 THE COURT: So, basically, the gloss on the statute is
16 that it doesn't have to be in the judgment of the district
17 court likely to result in reversal, it just has to be
18 non-laughable.

19 MR. MOORE: That's correct, your Honor. It has to be
20 non-frivolous. It has to be substantial. If it were
21 otherwise, almost no district judge would find that the case is
22 likely to be reversed, correct?

23 THE COURT: Well, you never know. I actually got a
24 stay like this in the District of Rhode Island about 40 years
25 ago by persuading the district judge he was likely to be

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1 reversed. You could look it up.

2 MR. MOORE: I'm probably not going to take that tack,
3 your Honor, here. But, because we don't have to prove that we
4 are likely to succeed. It's sufficient that if he does
5 succeed, reversal or a new trial is likely.

6 And the Second Circuit has held, in *United States v.*
7 *Abuhamra*, that the statute establishes a right to liberty that
8 is not simply discretionary, but mandatory, if the substantial
9 showing in question is made.

10 The first substantial question that we believe is
11 presented here is based on the exclusion of Dr. Rascher's
12 expert testimony. Your Honor ruled from the bench during the
13 trial, but your Honor also issued a 37-page decision on
14 March 17, 2019, and we would point out that the fact that your
15 Honor chose to write on this issue after trial, and write in
16 such an extensive fashion explaining your reasoning, is
17 indicative of the fact that your Honor recognizes the exclusion
18 of this testimony is likely to be a substantial question on
19 appeal. The Second Circuit has reversed several convictions on
20 basis of the defendants' expert testimony was excluded. Most
21 recently in 2015, in the case that we've discussed at various
22 times, the *Litvak* case. The Second Circuit reversed that
23 decision when his expert witness, who was to present testimony
24 that the witness contended was relevant to materiality and good
25 faith, was excluded.

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1 Your Honor does not have to find, again, that the
2 exclusion of the expert testimony was erroneous. The issue is
3 whether it presents a substantial issue. And there is another
4 case, *United States v. Onumonu*, 967 F.2d 782, where the Second
5 Circuit also reversed and remanded for a new trial.

6 THE COURT: Well, you know, one problem you have here
7 with respect to this point, is that, even assuming the circuit
8 disagreed on admissibility, my view is that there is not a
9 close question, or at least it's my tentative view, subject to
10 what you say on whether the error was not harmless or was
11 harmful. Because I don't think it would have changed a thing.

12 MR. MOORE: I think that --

13 THE COURT: In short, the evidence was overwhelming.

14 MR. MOORE: I think, however, your Honor, that is a
15 matter that is subject to debate. It is possible that the
16 circuit could rule the other way. And it is also possible that
17 that issue, when supplemented by several other issues, presents
18 not one, but multiple substantial questions.

19 THE COURT: Let's get on to your other issues.

20 MR. MOORE: Yes, sir. The Second Circuit held in
21 *United States v. Randell*, 761 F.2d 122, that issues of first
22 impression are appropriate for bail pending appeal. And in
23 this case, your Honor gave a dual intent instruction. And I'm
24 sure your Honor recalls the debate about the dual intent
25 instruction. We objected to this instruction on the basis that

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1 a dual intent instruction had, at least based on our research,
2 never been given in a 1343 wire fraud or 1341 mail fraud case.
3 And at the charge conference your Honor told Ms. Donnelly that
4 there is a first time for everything, and you overruled our
5 objection. As a novel question we believe this issue, standing
6 alone, because it is novel, merits bail pending appeal, period.
7 Because as your Honor knows, this case was an intent case. The
8 facts weren't so much in dispute. The intent issue was.

9 THE COURT: Come to your next point.

10 MR. MOORE: Yes, sir, all right. The next issue is
11 the apparent authority instruction. Your Honor may also recall
12 a long dialogue, again with Ms. Donnelly, who argued most of
13 the points, about the charge regarding the apparent authority
14 instruction that was given as a part of the good faith
15 instruction to the jury. And particularly the instruction
16 regarding when coaches could be considered to be acting for
17 their own self-enrichment, under the Second Circuit's decision
18 in *United States v. D'Amato* was fiercely debated. And your
19 Honor charged the jury certain things, one of the parts of that
20 charge was an agent of a university is unconflicted if his or
21 her actions are fully aligned with the interests of the
22 university, and any time an agent takes an action, the agent
23 might simultaneously be acting for the benefit of the
24 university for whom the agent works, and have an additional
25 interest in profiting personally or otherwise benefiting him --

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1 THE COURT: You've got to get back to that slow
2 Southern way of talking.

3 MR. MOORE: All right. I will endeavor to do that. I
4 did not want to try your Honor's patience, but I understand the
5 court reporter has to take down what I have to say.

6 Your Honor's charge went on to say that the agent's
7 personal interest might be financial, they might be
8 non-financial, and to be unconflicted, the agent's personal
9 interest, to the extent the agent has any personal interest,
10 must be completely aligned with the interests of the
11 university.

12 Ms. Donnelly, on behalf of all defendants, objected on
13 the basis that this instruction went beyond the language that
14 the Second Circuit approved in *D'Amato*, and we argued that the
15 instruction was too broad. We argued that an agent's action
16 does not need to be fully aligned with the interests of the
17 master, with respect to your statement second of agency Section
18 236. Your Honor, at the charge conference, we recall,
19 indicated that this was a close question.

20 Indeed, after Ms. Donnelly objected, your Honor said,
21 look, I spent a lot of time thinking about this, and I find
22 it's pretty subtle, and I've tried to come to the right answer.

23 THE COURT: Maybe I should hear from Mr. Diskant.

24 MR. DISKANT: Sure. So, of the issues raised thus
25 far, on the expert, as the Court began to note, leaving aside a

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1 very significant harmlessness question, what the Court did is
2 the Court precluded the defendants from calling their expert to
3 testify to a series of things that were, one, wildly beyond his
4 realm of expertise; and two, had no relevance to this case.
5 The Court then reserved on certain areas of his proposed
6 testimony, that might have been relevant to this case, but
7 agreed with the government that a Daubert hearing would be
8 required in order to fully develop their evidence. The
9 defendants declined to pursue a Daubert hearing, and declined
10 to pursue their expert.

11 So it seems extraordinarily unlikely that whatever
12 component of that claim they have not waived by not pursuing a
13 Daubert hearing would overcome a harmlessness review, even if
14 there was a finding that the Court got that one wrong.

15 With respect to dual intent, my recollection, and
16 since I'm hearing these for the first time now, I don't have
17 the transcript in front of me. Is that the government's
18 position was that a dual intent instruction is routinely given
19 in cases such as this one, where there is an argument that
20 there is both a lawful and unlawful explanation for the
21 defendant's conduct. We pointed the Court to a series of
22 cases, including honest services wire fraud theories, which are
23 in fact wire fraud cases, in which that instruction was given.
24 I can point the Court to several within the last year. And so,
25 again, it seems very unlikely that the circuit is either going

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1 to find that to be erroneous, or, when reviewing the charge as
2 a whole, which of course the Second Circuit will, that that
3 isolated error constituted reversible error.

4 With apparent authority, my recollection is that the
5 Court, as I recall having this discussion with your Honor
6 during the charge conference, the government's request was that
7 the Court instruct the jury very in line with the instruction
8 in *D'Amato*. The defendants wanted the exact opposite. The
9 defendants kept trying to invert the language of *D'Amato*. The
10 Court overruled those requests. My memory is the jury was
11 instructed consistent with the language in *D'Amato*.

12 THE COURT: The standard for granting bail pending
13 appeal is, shall we say, a very low hurdle. I need not be
14 persuaded that any defendant is likely to prevail. I really
15 don't have to say much more than that the arguments are not on
16 their face ridiculous.

17 I'm prepared to essentially say that, and grant bail
18 pending appeal in light of the fact that I see no risk to the
19 public and certainly no risk of flight.

20 So bail pending appeal is granted. Defendants' bail
21 is continued on the same terms and conditions that have applied
22 up to now.

23 With respect to the sentence of incarceration, I
24 recommend to the bureau of prisons that the defendants all be
25 designated to minimum security facilities, and unless a

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1 defendant has a different wish, I'll recommend that it be as
2 close to their residence as possible. Anybody want something
3 else?

4 MR. SCHACHTER: Your Honor, with respect to Mr. Gatto,
5 I believe the only correctional institution in Oregon is FCI
6 Sheridan, and that's the closest one to his home. We ask that
7 the Court recommend he be designated there.

8 THE COURT: I so recommend.

9 MR. MOORE: We believe that the closest facility to
10 Mr. Code's home that has a minimum security facility is FCI
11 Edgefield. It has a camp there. We would ask your Honor
12 recommend he be incarcerated at the camp.

13 THE COURT: Tell me again?

14 MR. MOORE: FCI Edgefield in South Carolina.

15 THE COURT: So recommended.

16 MR. HANEY: We would request for Morgantown, West
17 Virginia.

18 THE COURT: So recommended.

19 Anything else, folks?

20 MR. DISKANT: There is an underlying indictment that
21 the government would move to dismiss at this time.

22 THE COURT: Granted. Anything else?

23 MR. SCHACHTER: Nothing further.

24 MR. MOORE: No, thank you.

25 THE COURT: Thank you all.